No. 80-1366

IN THE

Supreme Court of the United States

October Term, 1980

THE STATE OF CALIFORNIA
Petitioner,

vs.

RICHARD SCHUSTER, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does this Court have jurisdiction to review a decision of the California Court of Appeal which was based on the free speech guarantee of the California Constitution as well as the First Amendment?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents RICHARD SCHUSTER, ROBERT SIMON and MELVIN WALTER LEWIS respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the California Court of Appeal, Fourth Appellate District, Division One.[1/]

JURISDICTION

Respondents assert that this Court has no jurisdiction to review this case because the decision of the California Court of Appeal was based on an adequate and independent state ground. Respondents' position will be fully presented in the Argumment below.

1/ The Petition for Writ of Certiorari will be hereafter cited as "Pet. at ___." The Court of Appeal's decision reported at 109 Cal.App.3d 887 (1980), is attached as Appendix A of the Petition, and will be hereafter cited as "Schuster, supra, 109 Cal.App.3d at ___; Pet. App. at ___."

CONSTITUTIONAL PROVISIONS INVOLVED[2/]

California Constitution, Article I, Section 2:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

STATEMENT OF THE CASE

The statement of the case in the Petition for Writ of Certiorari makes a counter-statement of these matters unnecessary. (Pet. at 6-8)

ARGUMENT

THIS COURT LACKS JURISDICTION BECAUSE THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND

Petitioner's cursory discussion and strategic placement of the issue of whether the

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2/ The Petition only sets forth the First and Fourteenth Amendments to the United States Constitution and California Elections Code, Section 29410. (Pet. at 4-6)

decision of the California Court of Appeal was based on an adequate and independent state ground in the last three pages of its lengthy petition (Pet. at 44-46) should not divert this Court's attention from the specificity and clarity with which the Court of Appeal rested its decision on the California Constitution.

In striking down the blanket prohibition of anonymity in all campaign literature mandated by California Elections Code Section 29410, the Court of Appeal held that the statute was "on its face an unconstitutionally overbroad restraint of freedom of expression contrary to the First Amendment of the United States Constitution and Article I, Section 2 of the California Constitution." (Schuster, supra, 109 Cal.App.3d at 891; Pet. App. at A-3) At the conclusion of its opinion, the Court of Appeal reiterated that its decision was based on "the premise firmly embedded in our state and federal constitutions

that to stifle discussion is to menace the basic structure of our government." (Schuster, supra, 109 Cal.App.3d at 899; Pet. App. at A-16-17)

It is hard to imagine how a state court could more clearly declare that its decision rested on an independent state ground. Petitioner tries to characterize the decision as resting "entirely upon interpretation of the First Amendment of the United States Constitution, and this Court's opinion in Talley v. California, supra, 362 U.S. 60." (Pet. at 44-45); but even a cursory review of the opinion reveals the distortion in this characterization. As if to anticipate and refute in advance petitioner's statement to this Court that the decision "rests entirely upon interpretation of the First Amendment," the Court of Appeal clearly held that that "our decision also rests on Article I, Section 2 of the California Constitution." (Schuster, supra, 109 Cal.App.3d at

899, n. 3; Pet. App. at A-16, n. 3)

Equally incorrect is petitioner's assertion that the Court of Appeal decision was simply an interpretation of this Court's opinion in Talley v. California, 362 U.S. 60 (1960). The Court of Appeal explicitly relied on the consistent recognition of the constitutional protection for anonymous speech rendered in prior California decisions, such as: Canon v. Justice Court, 61 Cal.2d 446 (1964); Huntley v. Public Utility Commission, 69 Cal.2d 67 (1968); Britt v. Superior Court, 20 Cal.3d 844 (1978); and Ghafari v. Municipal Court, 87 Cal.App. 3d 253 (1978). (Schuster, supra, 109 Cal. 3d at 895; Pet. App. at A-9-10)[3/]

Once the fact that the decision below rested on the California Constitution as

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3/ Throughout its opinion, the Court of Appeal coupled citations to decisions of this Court with citations to California precedents. (Schuster, supra, 109 Cal.App.3d at 892-93; Pet. App. at A-5-7)

well as the United States Constitution is recognized, it is clear that this Petition for Writ of Certiorari must be denied. It is the "settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); accord, e.g., Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 491-92 (1956); Herb v. Pitcairn, 324 U.S. 117, 125-28 (1945); Enterprise Irrigation District v. Farmers' Mutual Canal Company, 243 U.S. 157, 164 (1917); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635 (1875).[4/]

4/ "And of course state courts that rest their decision wholly or even partly on state law...not only cannot be overturned by, they indeed are not even reviewable by, the

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In the face of this "settled rule" and the Court of Appeal decision, it is difficult to fathom petitioner's argument in favor of this Court's jurisdiction. Aside from its mischaracterization of the decision, petitioner's only other point is that the "California Court of Appeal has clearly interpreted the federal and state Constitutions as coextensive." (Pet. at 45) However, the independent state ground rule depriving this Court of jurisdiction is not dependent on the state constitution providing broader protection than the federal constitution, but rather clearly applies with full force even when both constitutions are similar in scope. E.g., Jankovich v.

4/ [Continued]

Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions." Brennan, "State Constitutions and the Protection of Individual Rights" 90 Harv.L.Rev. 489, 501 (1977); see Payton v. New York, 445 U.S. 573, 600 (1980).

v. Indiana Toll Road Comm'n, supra.[5/]

If petitioner's claim is that the Court of Appeal's ruling under Article I, Section

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5/ When faced with a California decision on equal protection grounds that, unlike the instant case, did not state whether it was based on the state or federal constitution, "or both," this Court vacated the decision for clarification by the California Supreme Court. Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196, 201 (1965). On remand, the California Supreme Court made it clear that it had relied on both federal and state equal protection guarantees, which it believed provided "generally equivalent but independent protections...." Department of Mental Hygiene v. Kirchner, 62 Cal.2d 586, 588 (1965). Yet the Court's conclusion that the guarantees were "equivalent," or coextensive, did not in any way mitigate the presence of an adequate and independent state ground: "While it is our view that we should reach the same conclusion under the Fourteenth Amendment, we were (and we are) in any event independently constrained to the result we reached by sections 11 and 21, article I of the California Constitution." Id. See People v. Krivda, 8 Cal.3d 623 (1973), after remand, sub nom California v. Krivda, 409 U.S. 33 (1972); Rios v. Cozens, 9 Cal.3d 454 (1973), after remand sub nom, Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973).

Of course, the clarification needed by this Court in Kirchner, Krivda and Rios, because of the lack of mention in the initial state court decisions of the state constitutional ground, is not needed in the instant

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2 was dependent upon or compelled by its interpretation of the First Amendment, then it is clear that petitioner has chosen the wrong state and the wrong state constitutional provision to make such an argument. In interpreting its state constitution, California courts have "led the nation in the development of independent interpretation." Note, "The New Federalism: Toward a Principled Interpretation of the State Constitution," 29 Stan.L.Rev. 297, 301 (1977). The California Supreme Court has clearly articulated the principle behind the independent character of the state constitution:

> [I]n the area of fundamental civil liberties -- which includes not only freedom from unlawful search and seizure but all protections of the California Declaration of Rights -- we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the

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5/ [Continued]

case, where the Court of Appeal several times explicitly stated its reliance on state constitutional grounds.

> national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. People v. Longwill, 14 Cal.3d 943 951, n. 4 (1975); accord, People v. Pettingill, 21 Cal.3d 231, 247 (1978)

This principle has been implemented in case after case in which the California Constitution has been the primary and independent basis for a judicial decision.[6/] The people of California approved this course

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6/ E.g., City of Santa Barbara v. Adamson, 27 Cal.3d 123 (1980) (right to privacy); Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979) (free speech in shopping centers); People v. Wheeler, 22 Cal.3d 258 (1978) (right to an impartial jury); People v. Pettingill, 21 Cal.3d 231 (1978) (privilege against self-incrimination); People v. Hannon, 19 Cal.3d 588 (1977) (right to speedy trial); Serrano v. Priest, 18 Cal.3d 728 (1976) (equal protection); Allen v. Superior Court, 18 Cal.3d 520 (1976) (self-incrimination); People v. Brisendine, 13 Cal.3d 528 (1975) (search and seizure); Burrows v. Superior Court, 13 Cal.3d 238 (1974) (protection of bank records); People v. Anderson, 6 Cal.3d 628 (1972) (death penalty held violative of state ban on cruel or unusual punishment); People v. Cahan, 44 Cal. 2d 434 (1955) (adopting the exclusionary rule later adopted by the United States

[Continued...]

of judicial independence and embodied it into the California Constitution in 1974 by adding a constitutional provision which explicitly reaffirms that state constitutional rights "are not dependent on those guaranteed by the United States Constitution." Calif. Const., Article I, Section 24. Finally, this Court recently recognized approvingly the independent status of rights guaranteed under the California Constitution. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

Furthermore, this principle of independent interpretation has been explicitly applied to Article I, Section 2 of the California Constitution, the independent state ground invoked in the instant case. It is clear that the state free speech guarantee is a "protective provision more

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6/ [Continued]

Supreme Court and ultimately made applicable to the states).

definitive and inclusive than the First Amendment...." Wilson v. Superior Court, 13 Cal.3d 652, 658 (1975); Robins v. Pruneyard, 23 Cal.3d 899, 908 (1979), aff'd 447 U.S. 74 (1980); People v. Glaze, 27 Cal. 3d 841, 844, n. 2 (1980).[7/]

Significantly, the independent and more protective character of Article I, Section 2 was first clearly articulated in a case in which it was relied on by the California Supreme Court to invalidate an injunction that was claimed necessary to prevent "the circulation of misleading

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7/ The independent scope of Article I, Section 2 is emphasized by the difference between its wording and that of its federal counterpart. The First Amendment is a terse, restrictive mandate:

> Congress shall make no law... abridging the freedom of speech, or of the press...."

Article I, Section 2 goes further:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

[Continued...]

charges against a candidate [which] interferes with the democratic voting process." Wilson v. Superior Court, supra, 13 Cal.3d at 660. Thus, the California Supreme Court has already made it clear that Article I, Section 2's broader protection is applicable in considering the same "compelling" interests that petitioner is asserting in the instant case. (Pet. at 24); see, Loza v. Panish, 102 Cal.App.3d 821, 824 (1980)

By explicitly citing and relying in its opinion on these precedents establishing the "more definitive"scope of Article I, Section 2, the Court of Appeal was making it quite clear that it was striking down Elections Code Section 29410 on an adequate

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7/ [Continued]

The addition of an affirmative right to "freely speak, write and publish" by the drafters of the California Constitution underscores the independent status of Article I, Section 2. Robins v. Pruneyard Shopping Center, supra, 23 Cal.3d at 908.

and quite independent state ground. (Schuster, supra, 109 Cal.App.3d at 892-93; Pet. App. at A-6)

The instant case perfectly illustrates the wisdom of this Court's "settled rule" of declining jurisdiction when the state Court decision rests on an adequate and independent state ground. The rationale behind the rule was delineated in Herb v. Pitcairn, supra, 324 U.S. at 125-26:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

In view of the clearly independent and more protective scope of Article I, Section 2, and in view of the Court of Appeal's unmistakable reliance on that provision in its decision, if this Court were to grant

certiorari in the instant case and to adjudge the constitutionality of Elections Code Section 29410 under the First Amendment, the resulting decision would be purely "advisory" and hypothetical with respect to California. For even if this Court were to accept petitioner's arguments and conclude that Section 29410 does not violate the First Amendment, the statute would still be violative of the "more protective" provisions of Article I, Section 2 of the California Constitution, "thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question." Department of Mental Hygiene v. Kirchner, supra, 380 U.S. at 197.[8/]

8/ The Court of Appeal made this quite clear in its opinion. In discussing a federal campaign disclosure statute that had been upheld by a federal district court as not violative of the United States Constitution, the Court of Appeal stated that it disagreed

[Continued...]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: March 3, 1981

Respectfully submitted,

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8/ [Continued]

with the federal court decision, and that in any case the federal statute was narrower than Section 29410. The Court concluded its discussion as follows: "Moreover, our decision also rests on Article I, Section 2 of the California Constitution." (Schuster, supra, 109 Cal.App.3d at 899, n. 3; Pet. App. A-16, n. 3) In other words, even if the First Amendment would be interpreted to permit a prohibition of anonymous literature, the Court of Appeal would rule that a blanket prohibition violated the California Constitution. This is the very situation that this Court's jurisdictional rule was designed to forestall.